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United States of America

In the

Supreme Court of the United States

OCTOBER TERM, 1945

No. 318

THE SOCIAL SECURITY BOARD,
Appellant,
vs.
JOSEPH NIEROTKO,
Appellee

BRIEF FOR JOSEPH NIEROTKO

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OPINIONS BELOW

The opinion of the United States Circuit Court of Appeals for the Sixth Circuit (R. 53) is reported in 149 F. 2d 273. The District Court of the United States for the Eastern District of Michigan, Southern Division, did not render an opinion.

JURISDICTION

Appellee accepts the statement of the Social Security Board as to jurisdiction.

QUESTION PRESENTED

Appellee accepts the statement of the Social Security Board, namely:

> "Whether 'back pay' awarded pursuant to Section 10(c) of the National Labor Relations Act constitutes 'wages' under the Social Security Act, for which the employee is entitled to credit on his Old Age and Survivors Insurance Account."

STATUTES INVOLVED

Applicable Provisions of the National Labor Relations Act [49 Stat. 453 (July 5, 1935)]

Section 2(d) of the Act defines an employee to include

> "Any individual whose work has ceased as a consequence of, or in connection with any current labor dispute or because of any unfair labor practice, and who has not obtained any other regular and substantially equivalent employment."

Section 10(c) of the Act provides that

> "If upon all the testimony taken the board shall be of the opinion that any person named in the complaint has engaged in or is engaging in any such unfair labor practice, then the board shall state its findings of fact and shall issue and cause to be served on such person an order requiring such per-

son to cease and desist from such unfair labor practice, and to take such affirmative action, including reinstatement of employees with or without back pay, as will effectuate the policies of this act."

Applicable Provisions of the Social Security Act[1]
[49 Statute 624 (August 14, 1935)]

The provisions of the Social Security Act[1] deal with the taxes for federal old age insurance benefits and for federal unemployment compensation. Both are substantially identical.

Section 209(a) of the Social Security Act defines "wages" as "all remuneration for employment."

Section 209(b) defines "employment" as "any service, of whatever nature, performed—by an employee for the person employing him."

Section 205(c) (1) of the Social Security Act provides:

> "On the basis of information obtained by or submitted to the Board and after such verification thereof as it deems necessary, the Board shall establish and maintain records of the amounts of wages paid to each individual."

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[1]The benefit features of the old-age and survivor's insurance system are set forth in Title II of the Social Security Act, 42 U. S. C. (1940), Sec. 402; the taxing features of this program are set forth in the Federal Insurance Contributions Act, Subchapter A of the Chapter 9 of the Internal Revenue Code, as amended, 26 U. S. C. (1940) Sec. 1400 *et seq.*

STATEMENT

Appellee accepts the statement[2] of the Social Security Board with the following additional statement: The instant suit is a test case to determine whether back pay awarded to thousands of illegally-discharged employees under the provisions of the National Labor Relations Act shall be considered as wages for the purpose of computing benefits under the Social Security Act. The suit has been so regarded by all parties to the litigation since its inception.

On August 9, 1939, the National Labor Relations Board issued a decision and order commanding the Ford Motor Company to reinstate several employees (including the appellee) who had been discharged for union activities and to pay each employee a sum of money equal to that he would have earned as wages during the period from date of discharge to date of offer of reinstatement, less his net earnings during such period in other employment, including work relief projects. On December 5, 1940, the United States Circuit Court of Appeals for the Sixth Circuit entered a judgment commanding enforcement of the board's order, with certain modifications not material

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[2]Comment on petitioner's footnote No. 1.—The facts concerning the withholding of the Social Security tax by the Ford Motor Company correctly appear on Page 29 of the Record as follows:

> "The one per cent social security tax was not deducted from the total amount awarded to Mr. Nierotko by the National Labor Relations Board. That was true of all 23 cases included in the National Labor Relations Board's ruling of August 9, 1939, but in each of the 3,000 subsequent cases, the Ford Motor Company withheld the one per cent social security tax (pending a final determination as to whether amounts paid under such rulings constitute wages), pursuant to an agreement with the union. There was no such agreement in this case."

here (*National Labor Relations Board v. Ford Motor Company*, 114 F. (2d) 905) and on February 10, 1941, the Supreme Court of the United States denied the company's petition for a writ of certiorari (*Ford Motor Company v. National Labor Relations Board*, 312 U. S. 689) (R. 12).

The sum of $3,501.32 was paid to appellee as "back pay" by the Ford Motor Company, representing the amount he would have earned had he been permitted to work at his customary duties at the Ford Motor Company which he always remained willing and able to perform, but which the Ford Motor Company refused to permit him to perform in violation of the National Labor Relations Act (R. 12, 13).

SUMMARY OF ARGUMENT

"Wages" are defined in Sec. 290(a) of the Social Security Act as "all remuneration for employment." Section 209(b) defines "employment" as "any service of whatever nature performed by an employee for the person employing him." This definition is not a narrow or technical definition. The use of the words "any" and "of whatever nature" to describe "service" indicates that Congress intended as broad a construction as possible. Since "pay" and "wages," by dictionary definition and by common usage, are synonymous, "back pay" received under the provisions of the National Labor Relations Act by an "employee," as a matter of terminology, is "wages" under the Social Security Act.

As a matter of substance, back pay has the same incidents and characteristics as "wages." Back pay awards are computed exactly as wages. They are paid as the result of an employment relationship continued in legal

effect by statute. The recipients of back pay are employees. Back pay is considered "wages or compensation for personal services" under the Internal Revenue Act. It has been held provable as "wages earned" under the Bankrupty Act. Under the provisions of the National Labor Relations Act an employee who is re-instated is entitled to all of the benefits and incidents of employment as though he had been actually working.

Actual work, mental or physical, is not an essential requirement for payments to be considered "wages." If payments are made pursuant to an employment relationship, whether existing by contract or statute, and the recipient has held himself available for work, then such payments are wages even though his employer received no direct benefit and even though no mental or physical labor is performed.

The broad purposes and objectives of both the Social Security Act and the National Labor Relations Act are concededly effectuated by the construction of the Court below which held "back pay" under the National Labor Relations Act to be "wages" under the Social Security Act.

ARGUMENT

The National Labor Relations Act provides in Section 10 (c) that the National Labor Relations Board may in certain instances order "re-instatement of employees with back pay." Section 2(d) of the same Act defines an employee to include an "individual whose work has ceased because of any unfair labor practice, and who has not obtained any other regular and substantially equivalent employment." Benefits under the Social Security Act are based on "wages" which are defined in Section 209(a) as "all remuneration for employment." "Employment" in turn is defined in Section 209(b) as "any service of whatever nature." The Circuit Court of Appeals for the Sixth Circuit held that "back pay" received under the provisions of the National Labor Relations Act is "wages" or "remuneration for employment," within the meaning of the Social Security Act.

Appellant concedes that this construction is in conformity with, and will further the objectives and purposes of Congress as expressed in both the Social Security Act and the National Labor Relations Act.

Appellant's position is that the objectives and purposes of Congress cannot be effectuated because "of the letter of the Statute" (the Social Security Act).

An analysis of the provisions of the two acts with reference to their terminology and substance as well as their purpose and objectives shows, we believe, that back pay awards under the National Labor Relations Act constitute wages under the Social Security Act.

A. TERMINOLOGY

The pertinent language of the National Labor Relations Act and the Social Security Act shows that "back pay" awards under one act do constitute "wages" under the other act.

The terms "pay" and "wages" are synonymous. Thus Webster's International Dictionary defines "pay" as "that which is paid; remuneration; wages; salary." It defines "wage" as "that which is pledged or paid for work or other services; hire; pay." It defines "wages" as "pay" given for labor * * * syn. wages, hire, salary, pay, emolument * * * pay may be equivalent esp. to wages."

The definition of "wages" in the Social Security Act as "remuneration for *any* service of *whatever nature*" (italics supplied) is not a narrow or technical definition. It is even broader than the dictionary definition which is, "that which is pledged or paid for work or other services" or "pay given for labor." The use of the words "any" and "of whatever nature" to describe "service" indicates that Congress intended as broad a construction as possible. It is difficult to see how Congress could have used broader language.

"Pay" (used in the National Labor Relations Act) is ordinarily understood and is defined in the dictionary as synonymous with "wages."

Furthermore wages under the Social Security Act is defined as remuneration for "employment" and under the provisions of the National Labor Relations Act appellee was an "employee."

We submit that under the "letter of the statute," the Circuit Court of Appeals was correct in holding that "back pay" awarded to an "employee" under the National Labor Relations Act is "wages" under the Social Security Act.

B. SUBSTANCE

"Back pay" is awarded under the provisions of a statute, the National Labor Relations Act. Its incidents and characteristics are created by that statute. We will show that these incidents and characteristics are similar to those of ordinary "wages" or pay.[3]

1. Back pay awards are computed exactly as wages.

Back pay awards are computed exactly as wages are computed. A typical back pay order provides that the employer shall reimburse the employees "by payment to each of them, respectively, of a sum of money equal to that which each of them, respectively would normally have earned as wages during the period from the date of their discharge to the date of such offer of reinstatement, less any money earned by each of them, respectively, during that period." (See Third Annual Report, National Labor Relations Board, p. 201, n. 99.)

Deductions made in computing the amount of back pay due from the employer to the discriminated employee are made only with respect to wages earned by the employee from other employers during the period in which he had been discriminately discharged. Deductions may not be made, however, of income other than wages from such sources as welfare; unemployment compensation, insurance, etc.

The fact that back pay awards under the National Labor Relations Act are computed solely as wages is made clear

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[3]It has been judicially determined that back pay is not damages nor is it a penalty. *Republic Steel Corporation v. National Labor Relations Board*, 311 U. S. 7 (61 Sup. Ct. 77), *Agwilines v. N.L.R.B.* (C.C.A. 5th, 1936), 87 F. (2d) 146, *National Labor Relations Board v. Killoren, Trustee*, (C.C.A. 8th, 1941), 122 F. (2d) 609.

by decisions where the courts have refused to allow the board to require the employer to pay any sum which did not properly constitute wages. In the case of *Republic Steel Corporation v. National Labor Relations Board*, 311 U. S. 7 (61 Sup. Ct. 77) (1940) the Court refused to uphold a board order which required the employer to repay to the Government wages on work relief projects which the Government had paid to the employees during their period of discriminatory discharge, even though the employer had indirectly received the benefit of these wages in that they were deducted from the amount of the back pay awards.

2. The employment relationship continues as a matter of law and the recipients of back pay are employees.

Section 2(d) of the National Labor Relations Board specifically defines an employee to include "Any individual whose work has ceased * * * because of any unfair labor practice and who has not obtained any other regular and substantially equivalent employment."

In its decision in the *Republic Steel* case *(supra)* the court had occasion to discuss the nature of back pay, which it referred to as "compensation of employees." On this aspect of the case the court, in concluding that an award of back pay was not in the nature of a penalty or fine as would allow the board to compel the employer to pay anything more than loss of wages, stated:

> "The act is essentially remedial. It does not carry a penal program declaring the described unfair labor practices to be crimes. *The act does not prescribe penalties or fines* in vindication of public rights or provide indemnity against community losses as distinguished from the protection and *compensation of employees.*" (Italics supplied.)

In *Labor Board v. Waterman SS. Co.*, 309 U. S. 206, 218, it was said, "In the words of the Act an employer cannot terminate his employee's tenure of employment or any term or condition of employment because of union activity or affiliation. * * * They embrace, as well all elements of the employment relationship which in fact customarily attended employment. * * *"

So also, an employee who is discriminatorily discharged must maintain his position as an employee. He must hold himself available for work when called by his employer or lose any further right to back pay. (See Third Annual Report of National Labor Relations Board, pages 201, 202.)

The argument has also been advanced that although the National Labor Relations Act defines an employee to include an "individual whose work has ceased because of any unfair labor practice," such a person is not an "employee" within the meaning of the Social Security Act.

It will be noted that the Social Security Act does not define the term "employee." Under the common law an employer had the right to discharge an employee for union activities and the employment relationship thereupon terminated. Congress, however, in the National Labor Relations Act, has modified the common law rule by making it illegal for an employer to terminate the employment relationship by discharging an employee in pursuance of an unfair labor practice. Congress has provided that the person so discharged remains an "employee" despite the action of the employer.

The argument that such person is nevertheless not an employee under the Social Security Act apparently proceeds on the theory that the Social Security Act refers to employees only as they were so considered in law prior to the enactment of the National Labor Relations Act.

Such a construction is not warranted by the language of the Social Security Act or by its broad purposes.

It must be presumed that by using the term "employee," without definition, in the Social Security Act which it adopted on August 14, 1935, Congress had fully in mind its definition of the term "employee" in the National Labor Relations Act which it had adopted only a month before, on July 5, 1935.

3. Decisions of State Courts hold that back pay constitutes wages.

The Unemployment Compensation Commissions in the various states have had occasion to determine whether back pay under the National Labor Relations Act constituted wages under their respective Unemployment Compensation Acts. The decisions of the various commissions are divided on this issue. However, two such decisions by the New York Unemployment Compensation Board, holding that back pay under the National Labor Relations Act constitutes wages under the New York Unemployment Insurance Act, were affirmed on appeal to the courts.

In re Tonra, 258 App. Div. 835, 15 N. Y. S. (2d) 755 (1939),

McCoy v. Remington Rand, Inc., 262 App. Div. 790, 27 N. Y. S. (2d) 298.

4. Back pay is considered as "wages or compensation for personal services" under the Internal Revenue Act.

Recently the District Court for the Eastern District of Michigan had occasion to determine that back pay under the National Labor Relations Act constitutes "wages or compensation for personal services." *Manseau v. United States*, 52 Fed. Supp. 395 (1943). In this case an employee of the Ford Motor Company, who was awarded back pay at the same time as the plaintiff herein, sought to establish that the back pay so received did not constitute income within the meaning of the income tax laws. The court discussed the nature of a back pay award under the National Labor Relations Act and made the following pertinent observation:

> "The money received by plaintiff which has been referred to in the findings of fact as *back pay is income derived from wages or compensation for personal services* within the meaning of Section 22 (a) of the Internal Revenue Act, 26 U. S. C. A. Int. Rev. Code Sec. 22 (a)." (Italics supplied.)

5. "Back pay" has been held provable as "wages earned" under the Bankruptcy Act.

A recent case in which the court has had occasion to pass upon the nature and character of back pay under the National Labor Relations Act is that of *National Labor Relations Board v. Killoren, Trustee* (C. C. A. 8th, 1941) 122 F. (2d) 609. In that case the court was asked to determine that a back pay award under the National Labor Relations Act was provable as a wage claim under the Bankruptcy Act. In a well-reasoned opinion the court discussed the leading decisions on the nature of back pay awards and reached the conclusion that back pay constituted "wages earned" within the meaning of the Bank-

ruptcy Act. Significantly, the court, in examining the status of a discriminatorily discharged employee during his period of discharge, found that he had a "continued status under the act as an employee," and that as a consequence he had "constructively earned" his back pay. The following pertinent discussion deals directly with the issue involved in the present case:

> "The purpose of a back pay allowance under the National Labor Relations Act, when awarded by the board to effectuate the policies of the act, is, as has been indicated above, to leave an employee, as nearly as possible, in the same situation that he would have occupied, if there had been no discrimination against him. *As to the employee at least, it is, in a practical and sound legal sense, nothing more or less than wages.* It is compensation to which he is entitled, by reason of his continued status under the act as an employee, and which the act and the order of the board regard him as having *constructively earned.* The language of the act specifically denominates it 'back pay.' It ought not, therefore, equitably or in the spirit of the act, to be given either a superior or a subordinate legal position to the wages of other regular employees, if there is any sound way to avoid doing so."

> "We have declared above that a back pay allowance, under the provisions of the National Labor Relations Act, is intended as, and *constitutes, wages which a workman has constructively earned by reason of his continued status as an employee.* This view clearly brings it within the operation of Par. 64a (2), 11 U. S. C. A. par. 104a (2), governing wage priorities. If the act had authorized such an allowance to be made in the nature of damages, a different situation would perhaps be presented. Congress has, however, specifically made it 'back pay' in a *continued employment status,* and this sufficiently constitutes it 'wages earned' to eliminate legal shawods." (Italics supplied.)

We submit that if back pay under the National Labor Relations Act is "wages *earned*" under the Bankruptcy Act, it should be considered as "wages" under the Social Security Act.

6. A reinstated employee under the National Labor Relations Act is entitled to all of the benefits and incidents of employment as though he had been actually working.

The employee discharged as a result of an unfair labor practice who is ordered reinstated is entitled, in addition to back pay, to all the other benefits of employment which he would have obtained had he actually been working for the employer. Thus such an employee, upon reinstatement, is entitled to all his insurance rights, his vacation rights, his seniority status and any other rights that may have accrued to him had he not been illegally discharged.

N. L. R. B. v. Jones & Laughlin Steel Corp., 301 U. S. 1.

Republic Steel Corp. v. N. L. R. B., 311 U. S. 7.

Republic Steel Corp. v. N. L. R. B., 114 F. (2d) 820.

Third Annual Report of National Labor Relations Board, page 200.

The Circuit Court of Appeals for the Sixth Circuit pertinently observed (R. 45)

> "We are asked to hold that of the rights of unlawfully discharged employee protected by the Labor Act, all may be preserved by administrative order, except the single right which in the exigencies of a post-war period may be the most important. * * *"

7. The legal doctrine of "constructive services" applies to employees reinstated under the National Labor Relations Act.

Although the doctrine of "constructive earnings" or "constructive services" need not be adopted to justify the conclusion that back pay constitutes wages, the application of this doctrine to the status of a discriminatorily discharged employee would be in accord with recognized legal principles.

Under the English common law the doctrine that an employee who had been illegally discharged had constructively performed services for his employer was generally recognized. While more recent English decisions have apparently repudiated this doctrine, it is recognized as sound law in many states by decision or by statute. It is significant, however, that those jurisdictions in this country which have rejected the doctrine have done so in the belief that if the court permitted an illegally discharged employee to be considered as having been constructively employed, such doctrine would be "not only at war with principle, but with the rules of political economy, as it encourages idleness * * *. Though the master has committed a wrong, the servant is not for one moment released from the rule that he should labor. * * *" *Carmean v. North American Transp. Co.*, 45 Wash. 446, 8 LRA (NS) 595.

(For a full discussion of the doctrine of Constructive Service as developed in English and American jurisprudence see 35 Am. Jur. page 484; 8 ALR 342; 17 ALR 630.)

The "encouragement of idleness" theory in its application toward the employment relationship is itself repudiated by the National Labor Relations Act which by definition gives continuing status to an employee who has been discharged as a result of an unfair labor practice and makes it possible for him to obtain the full benefits of such status, including back pay.

If the legal concept of "constructive service" were applied to the status of a discriminatorily discharged employee under the National Labor Relations Act, it would clearly follow as a legal conclusion that back pay received by him would be reimbursement for services rendered and would therefore be taxable under the Social Security Act.

8. The fact that the employer presumably derives no direct benefit from the payment of "back pay" does not change its character as wages.

The fact that in the ordinary case of wage payments the employer presumably receives a direct benefit, while in cases where back pay is awarded he presumably receives no benefit, is of no significance.

Whether or not the employer received any actual benefit from the employee cannot be determinative of whether payments constitute wages. Payments made by employers to employees who are absent from work while serving in the State National Guard[4] and to employees absent from work while on jury service[5] are held by the Social Security Board to be "wages" within the meaning of the Social Security Act.[6]

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[4]SST 49 CB XV-2, 420 (1936).

[5]SST 389 CB 1940-1, 212.

[6]If benefit to the employer were a requirement it could well be argued that the Ford Motor Company in the instant case did derive benefits from the discharge of over 3,000 of its employees (including Appellee) for union activities and in violation of the provisions of the National Labor Relations Act. It is quite probable that these discharges delayed the organization of its employees thereby delaying wage increases and better working conditions resulting when organization became effective. It is quite probable that the saving thus resulted to the employer exceeded the amount paid as "back pay."

Section 490(a) of the Social Security Act provides:

> "The term 'wages' means all remuneration for employment * * * except that such terms shall not include * * * (5) dismissal payments which the employer is not legally required to make."

This exclusion of "dismissal payments," except those which the employer is legally required to make, became effective by amendment on January 1, 1940. Since then only those "dismissal payments" received by employees under individual contracts or union agreements or which are otherwise required by law are considered as "remuneration for employment." There would seem to be no distinction in principle between "dismissal payments" which the employer is legally required to make, and "back pay" which the employer pays only because he is required by statute so to do. Neither dismissal payments, to an employee or payments made to an employee while on jury service or on service with the National Guard are paid for direct benefits to the employer. Since such payments are held to be wages under the provisions of the Social Security Act it is evident that the fact that an employer derives no direct benefit from "back pay" awards to an employee under the National Labor Relations Act does not change its character as "wages."

9. Back pay does not change its character as wages merely because a discharged employee does not perform actual work for the employer.

Although an employee who is discriminatorily discharged is not actually working, he must hold himself available for work when called by his employer. If his employer offers to reinstate him, he must accept the offer. If he refuses, he loses his right to any further back pay or any other benefits arising from the employment relationship. (See Third Annual Report of National Labor Relations Board, pages 201, 202.)

The Circuit Court of Appeals correctly observed that "if services performed in the asserted meaning of that phrase is a statutory element in the concept of wages, must there not then be an inquiry in every case as to whether the wages were earned by service? Admitting a contract of employment, an obligation to pay, and the liquidation of the obligation by payment, are the benefits of the Act not to be denied under the reasoning of the Board when no labor is performed? Tested, by *reductio ad absurdum*, its construction may not stand" (R. 45).

The requirement of actual physical or mental labor or work is discussed by Mr. Michael Egoner in Vol. 41 Michigan Law Review, page 66 (August 19, 1942). During the course of his discussion, from which he concludes that back pay under the National Labor Relations Act constitutes wages under the Social Security Act, the author states:

> "That actual physical or mental labor is immaterial for a finding that 'services' were performed, seems to be a well established principle. In *Re B. H. Gladding Co.*[29] the federal district court was asked

[29] (D.C.R.I. 1903) 120 F. 709.

to determine whether an employee had a valid priority claim for wages with respect to a vacation with pay under a plan established by the employer. The employee took the full vacation, but before he could obtain the pay, the employer went into bankruptcy and the referee in bankruptcy disallowed the claim, on the ground that the bankruptcy statute provided priority for wages earned and in this case the alleged wages had not been earned. The court contradicted the referee's determination and stated in part:

> "* * * To attempt distinctions between wages due which are earned and wages due which are not earned, by an inquiry into the amount of work done by the wage earner, would be entirely impractical. If we disallow claims for a week's vacation, we must also disallow claims for half days when stores are closed, and for days and hours when there is nothing to do. Wages 'are earned,' in the sense in which that term is used in the bankruptcy act, so long as a *bona fide* contract of hiring exists, and the clerk or servant continues in the master's employment and does all that he is required to do. The practice of giving vacations with continued pay is very general in all departments of business. Vacation wages cannot be regarded as a mere gratuity, given in recognition of past or present services. By continuing the relation of employer and employee during a dull season, the employer holds his working force in readiness for the active season. The relation of the employer and employed is as strictly a business relation as it is during the working season, and there is full legal consideration for the master's promise to pay wages during this period."[49]

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[49]Id. 711.

"The social security statute itself clearly departs from any principle that a showing of services in the form of actual physical or mental labor must be made. The following types of payments have been deemed to be 'wages' although they arise in situations in which actual labor has obviously not been performed:[41]

"(a) Vacation pay;

"(b) Sick pay, disability pay, medical and hospital expenses, when such payments are not a part of an established plan;

"(c) Pay while on state National Guard duty;[42]

"(d) Retainer fees to consultants, etc."

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[41]Cf. Social Security Board, Regulations No. 3, Secs. 403.827.

[42]Social Security Board, Unemployment Compensation Interpretation Service, Federal Series, 1937, 47 SST 49.

See also, on the point that actual physical or mental labor is immaterial for a finding that "services" were performed, *Gutzwiller v. American Tobacco Co.* (122 Atl. 586, Vt., 1923).

The foregoing discussion, we believe, amply supports the proposition that it is not essential that an employee be actually at work in order to earn wages within the meaning of the Social Security Act.

10. Whether back pay should be credited to the quarter in which it was paid or over the period of appellee's discharge is not an issue in this case.

Appellant discusses at some length whether back pay, if it is wages, should be credited to the quarter of the year in which it was paid or over the period of discharge. That issue is not involved in this case. In its answer filed in the District Court, the Social Security Board says:

> "The defendant admits that the sole question in dispute is whether the amount received by the plaintiff pursuant to the National Labor Relations Board consttiutes wages within the meaning of the Social Security Act" (R. 4). See also agreed statement of "question presented" in this Court *(supra)*.

11. The Administrative Construction of the Act is entitled to little weight.

Appellant contends that the court should uphold its administrative construction. This court recently ruled in *Skidmore v. Swift & Co.* (323 U. S. 134) that the weight to be given to the interpretation of the administrative agency "will depend upon the thoroughness evident in its consideration, the validity of its reasoning, its consistency with earlier and later pronouncements and all those factors which give it power to persuade if lacking power to control." Courts are properly reluctant to reverse an administrative ruling designed to effectuate the policy of a statute. In the instant case not only is the ruling *not* designed to effectuate the Congressional policy, but the administrative agency concedes that its construction is *contrary* to the objectives and purposes of the Social Security Act and the National Labor Relations Act. It relies for its construction on "the letter of the statute." We believe that the construction of "the letter of the Statute" is a matter peculiarly within the province of the Courts.

An administrative interpretation of the "letter of the Statute" not required to effectuate the policy of the statute, but admittedly contrary to its policy, is entitled to little weight.

The fact that the ruling of the Social Security Board has been in effect for some years lends no support to the Appellant's position in this case. There has been no prejudice to the Board by any delay. Furthermore, correspondence between counsel for appellee and the Board began on September 20, 1941, more than four years ago. Extended correspondence took place and several consultations were thereafter held in an effort to persuade the Board to change its determination. Administrative proceedings were commenced some time prior to November 3, 1942 (R. 30) and appellee has diligently pursued his remedy through the administrative procedure required and in the Courts to the present time.

C. POLICY[7]

We are here concerned with the relationship between two Federal statutes dealing in general with the same subject matter, the employment relationship. It can be set down as a fundamental principle that the two statutes should be consistently construed to effectuate the policies of both. From this point of view it becomes clear that back pay awards must be deemed wages within the meaning of the Society Security Act.

The purpose of back pay awards under the National Labor Relations Act is to make an employee whole. *Phelps-Dodge Corp. v. N.L.R.B.*, 313 U. S. 177. The power of the board in granting back pay is intended to restore an employee to all his rights and privileges. As we have already pointed out, such employees have been restored to full seniority status, and to full insurance and vacation benefits.

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[7](a) Under collective bargaining agreements it is a common practice to arbitrate the discharge or lay-off of employees, where it is claimed that such discharges and lay-offs violate the collective bargaining agreement. In many such cases employees are reinstated with "back pay" or are given back pay for the period of their lay off. If the test sought to be applied by appellant in this case, *i.e.*, that wages require the rendition of services by employees, such test would apply with equal force to the foregoing cases. Yet, so far as we have been able to ascertain, it is the practice of employers to treat such back pay as wages and so report to the Internal Revenue Bureau and Social Security Board. If such payments are to be finally held not to be wages and the Board records corrected accordingly, it will place an administrative burden on employers, the Internal Revenue Bureau and the Social Security Board far in excess of the administrative difficulties involved in crediting "back pay" in National Labor Relations Board cases as wages under the Social Security Act.

(b) It is quite probable that there will be instances in which veterans will be awarded back pay for periods during which they are denied reemployment by their former employer in violation of the Selective Training and Service Act. It would seem that the determination of the instant case will also determine the right of such veterans to protection under the Social Security Act.

In the further proceeding to clarify the decree of the Supreme Court in the *Republic Steel* case, *supra*, the Third Circuit held that the reinstated employees were entitled to the benefits of the vacation plan. In *Republic Steel Corp. v. N.L.R.B.*, *supra*, the court said:

> "The striking employees were ordered by the Board and by this Court to be reinstated 'without prejudice to their seniority or other rights or privileges.' We think it was the intention of the Board, as it was of this Court, to provide that *upon reinstatement the striking employees were to be treated in all matters involving seniority and continuity of employment as though they had not been absent from work.* It follows that the reinstated strikers are entitled to the benefits of Republic's vacation plan for the year in which they are reinstated and all subsequent years *upon a basis of continuity of service computed as though they had been actually at work during the entire period* from May 25, 1937, to the date of reinstatement. Thus an employee who had continuous service with Republic for twelve years prior to May 1, 1937, and who went out on strike in that month and was reinstated in January, 1940, would be entitled in 1940 to the vacation of 10 days granted by the vacation plan to employees having 15 years continuous service." (Italics supplied.)

In the present case, under the decision of the Social Security Board and of the Court below, an employee who has been illegally discharged by an employer and who has been ordered reinstated with back pay by an order of the National Labor Relations Board, will have lost rights and benefits to which he would have been entitled had he not been illegally discharged by his employer. He will have lost wage credits on his social security account which may affect his or his family's benefit rights under the Social Security Act. In some cases it may well determine whether an employee or his family are entitled to any

benefits whatsoever. Indeed several of the Ford employees, who received back pay along with plaintiff, will lose all rights to old age benefits, and several widows of deceased Ford employees will likewise lose all right to survivor's benefits, if the present ruling stands.

It was the obvious intention of Congress, in the National Labor Relations Act, to reinstate such employees "without prejudice to their seniority or other rights or privileges." But the interpretation adopted by the Social Security Board and the Court below would make impossible the effectuation of such a policy. Likewise it was the intention of Congress, in the Social Security Act, to give social security protection to workers in industry. But the present ruling would eliminate such protection from a substantial group of these workers. An interpretation at such variance with clearly expressed congressional objectives should be avoided if possible.

We have already pointed out that under a reasonable and proper interpretation of the Social Security Act "back pay" constitutes "wages." In these circumstances the Court should construe the Social Security Act so as to effectuate a policy which will be consistent with the congressional policy set forth in that act and in the National Labor Relations Act.

In the case of *N.L.R.B. v. Killoren, Trustee, supra,* the Court approached the problem of interpreting the Bankruptcy Act by seeking to achieve an interpretation which, if possible, would make consistent the policies of Congress as set forth in both the Bankruptcy Act and the National Labor Relations Act. The Court's approach to this problem is indicated in the following language:

> "We are of the opinion that a back pay allowance should accordingly be treated the same as any regu-

lar wage claim, for bankruptcy purposes, unless we are prevented from doing so by the provisions of the Bankruptcy Act."

* * * * *

"And so, public policy cannot permit such a valid order of the Board to be thwarted or escaped, if there is any sound way to prevent it."

A similar approach to the interpretation of the two laws here involved will effect a result similar to that arrived at in the *Killoren* case.

The congressional intention to consider back pay as wages for tax purpose was emphasized only a year ago. Under the decision in the *Manseau* case, *supra*, a discriminatorily discharged employee who received back pay was required to pay income tax on the entire amount received at the tax rate in effect during the year in which the money was paid to him. In order to remedy this injustice Congress adopted an amendment to the Internal Revenue Code (Sec. 119 of the Revenue Act of 1943 amending Section 107 of the Internal Revenue Code by adding subsection (d)) under which the employee could allocate his back pay (with the exception of amounts too small to warrant administrative inconvenience) over the period of his discharge and file amended returns including the back pay as income for the years he would have received it, had he not been discharged.

By this amendment Congress clearly evidenced its intention of effectuating the purposes of the National Labor Relations Act by placing the employee, for tax purposes, in exactly the position he would have been, had he not been illegally discharged. In doing so, Congress treated back pay under the National Labor Relations Act as wages actually or constructively earned by the employee during the period of his discharge. This recent congres-

sional action, disclosing an intention to treat back pay as wages for the purpose of effectuating the objectives of the Income Tax Laws and the National Labor Relations Act, is persuasive evidence that Congress likewise intended that back pay should be treated as wages in order to conform the objectives of the National Labor Relations Act with the Social Security Act.

In determining the meaning of the terms "employment" and "wages" under the Social Security Act it is important to note that the objective of the statute is not to deal directly with employment and wages as such, but only as a means of achieving the objective of providing social security in the public interest. This point is well made by Mr. Fooner in his article in the Michigan Law Review, *supra*, as follows:

> "While the statute thus defines 'employment' and 'wages' it must be recognized that the determination of what constitutes employment and wages does not purport to be an objective of the program. Quite otherwise, the purpose of the legislation is 'to provide for the general welfare' and 'to raise revenue' and, more specifically, '* * * of providing security for certain groups of the population, against the economic hazards resulting from old age and death.'"

Underlying the *Killoren* decision is the sound principle that the policy of the United States laid down in the National Labor Relations Act would be frustrated if full enforcement of a back pay award were denied in another federal statute dealing with bankruptcy and wage claims thereunder.

In the same way the present ruling of the Social Security Board and the Court below excludes back pay awards from the provisions of the Social Security Act,

particularly its tax provisions, and creates an inconsistent policy between two federal statutes and nullifies the purposes of both. The far-reaching social reforms adopted by the 74th Congress constituted, as a whole, a comprehensive interrelated program to provide security and protection for American workers. If congressional intention is to be effectuated, each part of the program should be construed, if possible, to harmonize with the objectives of the remainder. It would indeed be anomalous that an employer by virtue of the action of the federal government, may not deny an employee any incident of the employment relationship through the commission of an unfair labor practice, but that the federal government may do so.

Social security benefits are an incident of the employment relationship. The National Labor Relations Act states that none of these incidents of employment shall be lost to an employee. The appellant contends that an employee's period of employment should be interrupted, for the purposes of social security, during the period that he is denied work by his employer in the commission of an unfair labor practice.

Since neither the literal language of the statute nor the substance of the subject matter in question compels this result, it is without any foundation. We submit that the decision of the Circuit Court of Appeals for the Sixth Circuit is correct and should be affirmed.

Respectfully submitted,

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MORTON A. EDEN,
Attorneys for Appellee.

SUPREME COURT OF THE UNITED STATES.

No. 318.—October Term, 1945.

The Social Security Board, Petitioner, *vs.* Joseph Nierotko.	On Writ of Certiorari to the United States Circuit Court of Appeals for the Sixth Circuit.

[February 25, 1946.]

Mr. Justice Reed delivered the opinion of the Court.

A problem as to whether "back pay," which is granted to an employee under the National Labor Relations Act, shall be treated as "wages" under the Social Security Act comes before us on this record. If such "back pay" is a wage payment, there is also at issue the proper allocation of such sums to the quarters of coverage for which the "back pay" was allowed.

The respondent, Joseph Nierotko, was found by the National Labor Relations Board to have been wrongfully discharged for union activity by his employer, the Ford Motor Company, and was reinstated by that Board in his employment with directions for "back pay" for the period February 2, 1937, to September 25, 1939.[1] The "back pay" was paid by the employer on July 18, 1941. Thereafter Nierotko requested the Social Security Board to credit him in the sum of the "back pay" on his Old Age and Survivor's Insurance account with the Board.[2] In conformity with its minute of formal general action of March 27, 1942, the Board refused to credit Nierotko's "back pay" as wages. On review of the Board's decision,[3] the District Court upheld the Board. The Circuit Court of Appeals reversed. — F. 2d —. On account of the importance of the issues in the administration of the Social Security Act, we granted certiorari.[4] — U. S. —; Judicial Code § 240.

[1] N. L. R. A., Sec. 10(c), 49 Stat. 454.

[2] Social Security Act, Sec. 205(c)(3), 53 Stat. 1369.

[3] Sec. 205(g).

[4] The briefs of the Government advise us that more than thirty thousand individual employees were allowed "back pay" in "closed" cases by the National Labor Relations Board under Sec. 10(c), 49 Stat. 454, in the period 1939-1945. See Phelps Dodge Corp. v. Labor Board, 313 U. S. 177, 187, *Second*. The aggregate in money exceeded $7,700,000 in the fiscal years 1939 to 1944 as shown by the reports of the N. L. R. B. for those years.

During the period for which "back pay" was awarded respondent the Federal Old Age benefits were governed by Title II of the Social Security Act of 1935. 49 Stat. 622. As Title II of the Social Security Act Amendments of 1939 became effective January 1, 1940 (53 Stat. 1362), the actual payment of the "back wages" occurred thereafter. In our view the governing provisions which determine whether this "back pay" is wages are those of the earlier enactment.[5]

Wages are the basis for the administration of Federal Old Age Benefits. 49 Stat. 622. Only those who earn wages are eligible for benefits.[6] The periods of time during which wages are earned are important and may be crucial on eligibility under either the original act or the Amendments of 1939. See sec.

[5] By the foregoing statement it is not intended to imply that the variations in the definitions of wages between the two enactments are significant on the issues herein considered. Sec. 299 (b) of the Amendment recognizes possible differences in the meaning of employment: "(b) the term 'employment' means any service performed after December 31, 1936, and prior to January 1, 1940, which was employment as defined in section 210 of the Social Security Act prior to January 1, 1940 (except service performed by an individual after he attained the age of sixty-five if performed prior to January 1, 1939), and any service, of whatever nature, performed after December 31, 1939, by an employee for the person employing him . . ."

[6] "Sec. 202. (a) Every qualified individual (as defined in section 210) shall be entitled to receive with respect to the period beginning on the date he attains the age of sixty-five, or on January 1, 1942, whichever is the later, and ending on the date of his death, an old-age benefit (payable as nearly as practicable in equal monthly installments) as follows:

"(1) If the total wages (as defined in section 210) determined by the Board to have been paid to him, with respect to employment (as defined in section 210) after December 31, 1936, and before he attained the age of sixty-five, were not more than $3,000, the old-age benefit shall be at a monthly rate of one-half of 1 per centum of such total wages;

(2) If such total wages were more than $3,000, the old-age benefit shall be at a monthly rate equal to the sum of the following:

(A) One-half of 1 per centum of $3,000; plus

(B) One-Twelfth of 1 per centum of the amount by which such total wages exceeded $3,000 and did not exceed $45,000; plus

(C) One-twenty-fourth of 1 per centum of the amount by which such total wages exceeded $45,000."

Sec. 210. "(c) The term 'qualified individual' means any individual with respect to whom it appears to the satisfaction of the Board that—

(1) He is at least sixty-five years of age; and

(2) The total amount of wages paid to him, with respect to employment after December 31, 1936, and before he attained the age of sixty-five, was not less than $2,000; and

(3) Wages were paid to him, with respect to employment on some five days after December 31, 1936, and before he attained the age of sixty-five, each day being in a different calendar year."

210 (c) and compare sec. 209 (g), 53 Stat. 1376.[7] The benefits are financed by payments from employees and employers which are calculated on wages.[8] The Act defines "wages" for Old Age benefits as follows:

> "SEC. 210. When used in this title—
>
> "(a) The term 'wages' means all remuneration for employment, including the cash value of all remuneration paid in any medium other than cash. . . ."

Employment is defined thus:

> "(b) The term 'employment' means any service, of whatever nature, performed within the United States by an employee for his employer, except . . ."

The tax titles of the Social Security Act have identical definitions of wages and employment.[9] An employee under the Social Security Act is not specifically defined but the individual to whom the Act's benefits are to be paid is one receiving "wages" for "employment" in accordance with § 210 (c) and employment is service by an "employee" to an "employer." Obviously a sharply

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[7] Sec. 209. "(g) The term 'fully insured individual' means any individual with respect to whom it appears to the satisfaction of the Board that—

"(1) He had not less than one quarter of coverage for each two of the quarters elapsing after 1936, or after the quarter in which he attained the age of twenty-one, whichever quarter is later, and up to but excluding the quarter in which he attained the age of sixty-five, or died, whichever first occurred, and in no case less than six quarters of coverage, or

"(2) He had at least forty quarters of coverage.

As used in this subsection, and in subsection (b) of this section, the term 'quarter' and the term 'calendar quarter' mean a period of three calendar months ending on March 31, June 30, September 30, or December 31, and the term 'quarter of coverage' means a calendar quarter in which the individual has been paid not less than $50 in wages."

[8] 49 Stat. 636-37:

"Section 801. In addition to other taxes, there shall be levied, collected, and paid upon the income of every individual a tax equal to the following percentages of the wages (as defined in section 811) received by him after December 31, 1936, with respect to employment (as defined in section 811) after such date:

"(1) With respect to employment during the calendar years 1937, 1938, and 1939, the rate shall be 1 per centum. . . ."

"Sec. 804. In addition to other taxes, every employer shall pay an excise tax, with respect to having individuals in his employ, equal to the following percentages of the wages (as defined in section 811) paid by him after December 31, 1936, with respect to employment (as defined in section 811) after such date:

"(1) With respect to employment during the calendar years 1937, 1938, and 1939, the rate shall be 1 per centum. . . ."

[9] Sections 811 (a) and (b), and 907 (b) and (c).

defined line between payments to employees which are wages and which are not is essential to proper administration.[10]

Under the National Labor Relations Act an employee is described as "any individual whose work has ceased . . . because of any unfair labor practice." Sec. 2(3), 49 Stat. 450. The enforcement provisions of this Act under which Nierotko received his "back pay" allow the Labor Board to reinstate "employees with or without back pay." Sec. 10(c). The purpose of the "back pay" allowance is to effectuate the policies of the Labor Act for the preservation of industrial peace.[11]

The purpose of the Federal Old Age Benefits of the Social Security Act is to provide funds through contributions by employer and employee for the decent support of elderly workmen who have ceased to labor.[12] Eligibility for these benefits and the amount depends upon the total wages which the employee has received and the periods in which wages were paid.[13] While the legislative history of the Social Security Act and its amendments or the language of the enactments themselves do not specifically deal with whether or not "back pay" under the Labor Act is to be treated as wages under the Social Security Act, we think it plain that an individual, who is an employee under the Labor Act and who receives "back pay" for a period of time during which he was wrongfully separated from his job, is entitled to have that award of back pay treated as wages under the Social Security Act definitions which define wages as "remuneration for employment" and employment as "any service . . . performed . . . by an employee for his employer."

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[10] Provisions similar to those quoted are found in the Social Security Act Amendments of 1939. See sections 202(a), 202(e), 203(d), 209(a), (b), (e), (g), (h), and 601, 604, and 606 at 53 Stat. 1362 *et seq.*

[11] 49 Stat. 449.

"It is hereby declared to be the policy of the United States to eliminate the causes of certain substantial obstructions to the free flow of commerce and to mitigate and eliminate these obstructions when they have occurred by encouraging the practice and procedure of collective bargaining and by protecting the exercise by workers of full freedom of association, self-organization, and designation of representatives of their own choosing, for the purpose of negotiating the terms and conditions of their employment or other mutual aid or protection."

[12] See Helvering *v.* Davis, 301 U. S. 619, 641; H. Rep. No. 728, 76th Cong., 1st Sess., 3-4; S. Rep. No. 734, 76th Cong., 1st Sess., 3-4.

[13] Under the Social Security Act of 1935, see sec. 202(a) and sec. 210(b) *supra*, note 6. Under the 1939 Amendments, see sec. 202 and 209(e), (f) and (g), 53 Stat. 1363, *et seq.*

Surely the "back pay" is "remuneration." Under Section 10(c) of the Labor Act, the Labor Board acts for the public to vindicate the prohibitions of the Labor Act against unfair labor practices (section 8) and to protect the right of employees to self-organization which is declared by section 7.[14] It is also true that in requiring reparation to the employee through "back pay" that reparation is based upon the loss of wages which the employee has suffered from the employer's wrong. "Back-pay" is not a fine or penalty imposed upon the employer by the Board. Reinstatement and "back pay" are for the "protection of the employees and the redress of their grievances" to make them "whole." *Republic Steel Corp. v. Labor Board*, 311 U. S. 7, 11, 12. "... a worker's loss in wages and in general working conditions must be made whole." *Phelps Dodge Corp. v. Labor Board*, 313 U. S. 177, 196. "A worker is not given 'back pay' by the Board equal to what he would have earned with the employer but for the unlawful discharge but is given that sum less any net earnings during the time between discharge and reinstatement."[15]

Since Nierotko remained an employee under the definition of the Labor Act, although his employer had attempted to terminate the relationship, he had "employment" under that Act and we need further only consider whether under the Social Security Act its definition of employment, as "any service . . . performed . . . by an employee for his employer," covers what Nierotko did for the Ford Motor Company. The petitioner urges that Nierotko did not perform any service. It points out that Congress in considering the Social Security Act thought of benefits as related to "wages earned" for "work done."[16] We are unable, however, to follow the Social Security Board in such a limited circumscription of the word "service." The very words "any service . . . performed . . . for his employer," with the purpose of the Social Security Act in mind import breadth of coverage. They admonish us against holding that "service" can be only productive activity. We think that "service" as used by Congress in this definitive phrase means not only work actually done but

[14] Virginia Electric Co. v. Labor Board, 319 U. S. 533, 543.

[15] Phelps Dodge Corp. v. Labor Board, 313 U. S. 177, 196, 198. See Third Annual Report, National Labor Relations Board, 202; p. 41; Eighth Annual Report, 41; Ninth Annual Report 49. Nierotko's order was in this form. 14 N. L. R. B. 346, 410.

[16] H. Rep. No. 615, 74th Cong., 1st Sess., pp. 6, 21, 32, and S. Rep. No. 628, 74th Cong., 1st Sess., pp. 7, 32.

the entire employer-employee relationship for which compensation is paid to the employee by the employer.[17]

An argument against the interpretation which we give to "service performed" is the contrary ruling of the governmental agencies which are charged with the administration of the Social Security Act. Their competence and experience in this field command us to reflect before we decide contrary to their conclusion. The first administrative determination was apparently made in 1939 by an Office Decision of the Bureau of Internal Revenue on the problem of whether "back pay" under a Labor Board order was wages subject to tax under Titles VIII and IX of the Social Security Act which the Bureau collects.[18] The back pay was held not to be subject as wages to the tax because no service was performed, the employer had tried to terminate the employment relationship and the allowance of back pay was discretionary with the Labor Board. Reliance for the conclusions was placed upon *Aguilines, Inc.* v. *National Labor Relations Board*, 87 F. 2d 146;

[17] For example the Social Security Board's Regulations No. 3 in considering "wages" treats vacation allowances as wages. 26 CFR, 1940 Supp., 402.227(b).

Compare Armour & Co. v. Wantock, 323 U. S. 126, 133.

Treasury Department Regulations No. 91 relating to the Employees' Tax and the Employer's Tax under Title VIII of the Social Security Act, 1936, Art. 16, classifies dismissal pay, vacation allowances or sick pay, as wages. Regulations 106 under the Federal Insurance Contributions Act, 1940, pp. 48, 51, continues to consider vacation allowances as wages. It differentiates voluntary dismissal pay.

I. R. B., 1940, 1-22-10271, S. S. T. 389, an Office Decision, holds that amounts paid employees during absence on jury service to make their pay equivalent to regular salary are wages.

Though formal action was taken by the Social Security Board on March 27, 1942, our attention has not been called to any regulation of any governmental agency excluding "back pay" from wages. The Treasury Department has authority to issue regulations for Social Security taxes. Secs. 808 and 908, 49 Stat. 638, *et seq.*; I. R. C., Sec. 1429, 53 Stat. 178. So has the Social Security Board, sec. 1102, 49 Stat. 647, and sec. 205(a), 53 Stat. 1368. All authority for the promulgation of regulations limits the action to rules and regulations not inconsistent with the provisions of the various sections.

In regulations governing the collection of income taxes at source on or after January 1, 1945, 58 Stat. 247, the Bureau of Internal Revenue classified vacation allowances and dismissal pay as wages under the following statutory definition of wages:

"Sec. 1621. Definitions. As used in this subchapter—

(a) Wages. The term 'wages' means all remuneration (other than fees paid to a public official) for services performed by an employee for his employer, including the cash value of all remuneration paid in any medium other than cash; except that such term shall not include remuneration paid—" See 26 CFR, 1944 Supp., 405.101(d) and (e).

[18] I. R. B., 1939, 14-9776, S. S. T. 359. No regulations covering "back pay" under the Social Security Act have been found. They are authorized by §§ 808 and 908, 49 Stat. 638, 643.

which had held "back pay" a public reparation order and therefore not triable by jury as a private right for wages would have been. This position is maintained by the Social Security Board by minute of March 27, 1942. It is followed by the National Labor Relations Board which at one time approved the retention by the employer of the tax on the employees' back pay for transmission to the Treasury Department as a tax on wages and later reversed its position on the authority of the Office Decision to which reference has just been made. *Re Pennsylvania Furnace and Iron Co.*, 13 N. L. R. B. 49, 53(5), 54, 58.[19]

The Office Decision seems to us unsound. The portion of the *Aquilines* decision, which the Office Decision relied upon, was directed at the constitutional claim to a right of trial by jury. It stated that "back pay" was not a penalty or damages which a private individual might claim. But there is nothing in the opinion which supports the idea that the "back pay" award differs from other pay. Indeed the opinion said that "Congress has the right to eradicate them [unfair practices] from the beginning." 87 F. 2d at 151, l. c. We think the true relation of awards of "back pay" to compensation appears in the *Republic Steel* and *Phelps-Dodge* cases, hereinbefore discussed.[20]

But it is urged by petitioner that the administrative construction on the question of whether "back pay" is to be treated as wages should lead us to follow the agencies' determination. There is a suggestion that the administrative decision should be treated as conclusive, and reliance for that argument is placed upon *National Labor Relations Board* v. *Hearst Publications*, 322 U. S. 111, 130, and *Gray* v. *Powell*, 314 U. S. 402, 411. In the acts which were construed in the cases just cited, as in the Social Security Act, the administrators of those acts were given power to reach preliminary conclusions as to coverage in the application of the respective acts. Each act contains a standardized phrase that Board findings supported by substantial evidence shall be conclusive.[21] The validity of regulations is specifically reserved for

[19] The states have largely followed the Bureau of Internal Revenue in their classification of "back pay." Some have disagreed. Unemployment Insurance Service, All State Treatise, C. C. H., Paragraph 1201. See Robins Dry Dock v. Tonra, 258 App. Div. 835, 283 N. Y. 676.

[20] This is the view of the Eighth Circuit when a "back pay" claim was presented in bankruptcy. N. L. R. B. v. Killoren, 122 F. 2d 609, 614.

[21] National Labor Relations Act, 49 Stat. 454, sec. 10(e); Bituminous Coal Act of 1937, 50 Stat. 72, 85, sec. 4-A; Social Security Act Amendments of 1939, secs. 205(g)(3) and (g).

judicial determination by the Social Security Act Amendments of 1939, sec. 205(g).

The Social Security Board and the Treasury were compelled to decide, administratively, whether or not to treat "back pay" as wages and their expert judgment is entitled, as we have said, to great weight.[22] The very fact that judicial review has been accorded, however, makes evident that such decisions are only conclusive as to properly supported findings of fact. Both *Hearst Publications*, p. 131, and *Gray* v. *Powell*, p. 411, advert to the limitations of administrative interpretations. Administrative determinations must have a basis in law and must be within the granted authority. Administration when it interprets a statute so as to make it apply to particular circumstances acts as a delegate to the legislative power. Congress might have declared that "back pay" awards under the Labor Act should or should not be treated as wages. Congress might have delegated to the Social Security Board to determine what compensation paid by employers to employees should be treated as wages. Except as such interpretive power may be included in the agencies' administrative functions, Congress did neither. An agency may not finally decide the limits of its statutory power. That is a judicial function.[23] Congress used a well understood word—"wages"—to indicate the receipts which were to govern taxes and benefits under the Social Security Act. There may be borderline payments to employees on which courts would follow administrative determination as to whether such payments were or were not wages under the act.

We conclude, however, that the Board's interpretation of this statute to exclude back pay goes beyond the boundaries of administrative routine and the statutory limits. This is a ruling which excludes from the ambit of the Social Security Act pay-

[22] See Sanford v. Comm'r, 308 U. S. 39, 52; Skidmore v. Swift & Co., 323 U. S. 134, 139-40.

[23] School of Magnet Healing v. McAnnulty, 187 U. S. 94, 110; International Ry. Co. v. Davidson, 257 U. S. 506, 514; Iselin, v. United States, 270 U. S. 245; Koshland v. Helvering, 298 U. S. 441; Federal Comm'n v. Broadcasting Co., 309 U. S. 134, 144-145; United States v. Carolina Carriers Corp., 315 U. S. 475, 489; Helvering v. Credit Alliance Co., 316 U. S. 107, 112; Helvering v. Sabine Trans. Co., 318 U. S. 306, 311-12; Addison v. Holly Hill Co., 322 U. S. 607, 611, *et seq.*; cf. Stewart & Bro. v. Bowles, 322 U. S. 398, 403.

ments which we think were included by Congress. It is beyond the permissible limits of administrative interpretation.

Petitioner further questions the validity of the decision of the Circuit Court of Appeals on the ground that it must be inferred from the opinion that the "back pay" must be allocated as wages by the Board to the "calendar quarters" of the year in which the money would have been earned, if the employee had not been wrongfully discharged. We think this inference is correct.[24] This conclusion, petitioner argues, tends to show that "back pay" cannot be wages because the Amendments of 1939 use "quarters" as the basis for eligibility as well as the measure of benefits and require "wages" to be "paid" in certain quarters.[25]

If, as we have held above, "back pay" is to be treated as wages, we have no doubt that it should be allocated to the periods when the regular wages were not paid as usual. Admittedly there are accounting difficulties which the Board will be called upon to solve but we do not believe they are insuperable.[26]

Affirmed.

Mr. Justice JACKSON took no part in the consideration or decision of this case.

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[24] See Nierotka v. Social Security Board, 149 F. 2d 273, 274, r. c.

[25] See note 7, *supra*. The same problem would arise under the Social Security Act; 49 Stat. 625, sec. 210(c).

[26] The Social Security Board itself has recommended the inclusion of "back pay" in wages. Annual Report of the Federal Security Agency, Social Security Board (1945), sec. 5, p. 38:

"Certain types of income which are now not considered 'wages' under the definition in the act, should be included as wages, so that the base for benefits would represent the worker's actual remuneration from employment. These include tips, dismissal payments which the employer is not legally required to make but nevertheless does make, and payments made under orders of the National Labor Relations Board or a similar State board."

A pending bill, S. 1050, 79th Cong., 1st Sess., Part F, sec. 275, makes provision for the inclusion in wages under the Social Security Act of sums paid pursuant to the National Labor Relations Act.

"Back pay" is now treated distributively under the Internal Revenue Code. Sec. 119, Revenue Act of 1943, 53 Stat. 39.

SUPREME COURT OF THE UNITED STATES.

No. 318.—October Term, 1945.

The Social Security Board, Petitioner, vs. Joseph Nierotko	On Writ of Certiorari to the United States Circuit Court of Appeals for the Sixth Circuit.

[February 25, 1946.]

Mr. Justice Frankfurter concurring.

The decisions of this Court leave no doubt that a man's time may, as a matter of law, be in the service of another though he be inactive. *E. g., Armour & Co.* v. *Wantock*, 323 U. S. 126. This is, practically speaking, the ordinary situation of employment in a "standb-by" capacity. *United States* v. *Local 807*, 315 U. S. 521, 535. "The basis of a back-pay order under the National Labor Relations Act, 49 Stat. 449, 29 U. S. C. § 151, is precisely that. When the employer is liable for back pay, he is so liable because under the circumstances, though he has illegally discharged the employee, he still absorbs his time. *Phelps Dodge Corp.* v. *Board*, 313 U. S. 177. In short, an employer must pay wages although, in violation of law, he has subjected his employee to enforced idleness. Since such compensation is in fact paid as wages, it is a plain disregard of the law for the Social Security Board not to include such payments among the employees' wages. Neither the terms of the Social Security Act, 49 Stat. 620, 53 Stat. 1360, 42 U. S. C. § 301, nor the implications of policy, comparable to some aspects of the Railway Labor Act, 44 Stat. 477, 48 Stat. 926, 48 Stat. 1185, 49 Stat. 1921, 54 Stat. 758, 46 U. S. C. § 151, give the Board judicially unreviewable authority to exclude from wages what as a matter of law are wages. And so I concur in the decision of the Court.